

**IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF TEXAS HOUSTON DIVISION**

UNITED STATES OF AMERICA

v.

Cr. No. H-07-226

JAMES EARL DUNN

**DEFENDANT'S RESPONSE TO GOVERNMENT MOTION FOR
UPWARD DEPARTURE**

The defendant, Mr. Dunn, replies as follows:

1. The government's sentencing memorandum was filed on September 1, 2009 after 6:00 p.m. and was unavailable to the defendant until the day before sentencing. None of the underlying documents or statements referred to in the pleading were provided. Nonetheless, the factors enumerated by the government in its sentencing memorandum do not take this case outside of the already-determined guideline range of 18 to 24 months. The government argues for an adjusted offense level of 23 but fails to articulate how it arrives at that level. The amount of loss described in the plea agreement that the government wrote was "approximately \$330,000," setting an adjusted offense level of 18. A five-level increase would be loosely applicable to a total loss of somewhere between \$1,000,000 and \$2,499,999.

2. The government claims that the Texas Department of Assitive and Rehabilitative Services suffered an estimated loss of \$1.2 million between 1997 and

2002. Mr. Dunn's business, RSI, was not incorporated and did not become a provider of services until 2001. The indictment covers misconduct in 2002. There is no charge levied against Mr. Dunn for this time-barred conduct nor is there any acceptable proof. Certainly there is nothing to boot-strap onto a sentence on in this case.

3. The government chose to prosecute this case as a fraud against the government. There are always ripple effects from any fraud against the public purse; for those reasons it is a crime worthy of punishment and imprisonment. Mr. Dunn's conduct was reprehensible. It was also seven years ago. But punishment has to be proportionate to the crime. In this case the proportion is 18 to 24 months imprisonment. Nothing in the government's pleading takes this case outside of the heartland of such cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS S. BERG, certify that on September 2, 2009, a true copy of this statement was served by Notice of Electronic Filing; and via hand delivery, to the offices of Assistant United States Attorney Quincy Ollison, at 919 Milam, Suite 1500, Houston, Texas 77002, and to the office of United States Probation Officer Raegin Hart, 515 Rusk Avenue., 2nd Floor, Houston, Texas 77002.

/s/ Thomas S. Berg
THOMAS S. BERG